COMMENTS PRESENTED TO THE LOBBYING DISCLOSURE REGULATIONS COMMITTEE BY R. DAVID TIVE AUGUST 2, 2007

Good morning.

First of all, I would like to express my gratitude to the members of the Lobbying Disclosure Regulations Committee for providing this opportunity for comment on the complete package of proposed regulations to implement Act 134 of 2006. I would also like to express my gratitude to all you for all of the hard work and all of the time you have committed to producing these regulations.

Since I only have five minutes, I will limit my compliments to those few, although there are many other good things I can say about this package of regulations. However, by the nature of the process we are dealing with I am forced to concentrate on my concerns with the proposal we have in front of us. Today I will be giving only a summary of my full comments which I believe you already have.

But before I do that, one last caveat. My comments today are solely my own. I do not speak for my clients. I also do not speak for the Pennsylvania Association for Government Relations, a group which I am a member of, which I helped found, which served as President of, and for whom I led the efforts on lobbying reform for many years. PAGR is presenting elsewhere on today's agenda.

As many of you know, I have been working on the issue of lobbying reform for about a decade and a half. The old law, the one in place prior to 1998, was a joke. In 19 years of lobbying under that law I never once had to file an expense report, yet I was in full compliance the whole time. Act 93, passed in 1998, contained many things that were good, and a number that were not. But before it finally fell due to its one great internal flaw, it had been seriously damaged by inconsistent and incomplete implementation. Act 134, while not perfect, is a significant step forward. The regulations, therefore, need to also be a significant step forward. To complete the process, the implementing agencies also need to step forward in a major way. Having gone through the registration process and two quarterly reporting cycles, I can say that the Department of State has thus far done its share.

For the rest of my time here I will list, in summary fashion, some of the concerns or problems I see with the proposed regulatory package. I will, of course, be happy to take questions..

Chapter 51

Under §51.1 I believe that you need at add two more definitions. The first would be for "administrative proceedings". The term appears in §57.2 under exemptions. An attorney who is an expert in administrative law expressed to me a concern about whether adversarial proceedings in front of administrative agencies would fall under the exemption. I suspect, based on my experience in discussions on the passage of the Act, and in attending many of your meetings, that they are to be exempted. However, a specific clarification would help.

The second term that needs to be defined is "policy". It is included in the definition of "administrative action". My experience over the past 28 years is that different agencies interpret the word differently. While it is beyond your charge to resolve that problem, I believe it would help all involved to have one consistent definition for the purposes of registering and reporting under Act 134.

On page 18 of Chapter 51 as it appeared on the Attorney General's website this past Monday, there were two definitions of "reception". Since I do not know which will be finally adopted, let me comment on both.

The first definition says that the cost of the reception can be "based on the invoiced, per-person amount,...independent of the number of actual attendees." How would a principal handle that in the situation where it tells the caterer to prepare hors d'oeuvres for an evening reception for 100 legislators, and then, because the House stays in session until 11:00 PM, only 10 show up? The principal will be invoiced based on the 100 person order. I don't think it is clear from either the definition in Chapter 51, the reporting requirements in Chapter 55, or the Interim guidelines, how the reporting of that should be handled.

With regard to the second definition, my question surrounds the use of the word "open" in the first paragraph. The definition says that the reception must be "open to individuals from throughout a given industry." If, for example, a trade association were to hold a legislative reception and invite all those in the field represented by the association to attend, that would clearly be "open". If, as some groups do, the association charges its members to attend to help offset the cost of the reception, is that still "open"?

My final question in Chapter 51 is on the definition of "vendor". The proposed regulations include an exemption for lobbying firms from this definition. Would this also apply to a situation where a lobbying firm contracts with a governmental agency for lobbying services or for any of a variety of other professional services that some firms now provide? If so, would that exemption give the lobbying firm an unfair advantage over other possible vendors that are not lobbying firms? This could become important because the ban on contingent compensation for lobbyists does not include vendors.

Chapter 53

My first concern here is in §53.2(2). That says, "Lobbying by a principal on the principal's own behalf constitutes acting in the capacity of a principal." If the principal is an individual, as is allowed under the Act, would that principal when lobbying on his or her own behalf also be acting in the capacity of a lobbyist? As such, would he or she then not also have to register as a lobbyist? I hope that is what you intended. Because, when you combine this with language in §53.4(4) which says, "When a lobbyist engages in lobbying on its own behalf, the lobbyist shall also register as a principal", the argument becomes completely circular and I think you have guaranteed the inclusion of anyone trying to get around registration by operating on their own.

Next, I think there is an issue in §53.6, termination. As I read it, if I were to end my lobbying for one of my clients I would have to file a notice of termination. Would the client (principal) have to do so as well? If so, what would happen if I filed the notice but the client did not? If the Department cannot issue its letter stating that the registration has been terminated until it hears from both me and my now former client, am I still liable for quarterly reports for that client? I think this needs to be more clearly spelled out.

Chapter 55

Section 55.1(n) deals with situations under which a lobbying firm or lobbyist must file a separate quarterly expense report. This would happen when, according to the Act, "the lobbying firm or lobbyist engaged in lobbying which was not contained in any expense report filed by a principal or principals represented." In other words, the report must be filed when the lobbying firm or lobbyist lobbied or expended money that was not paid for by a client or client(s).

However, in paragraph (5) the regulations allow a lobbying firm or lobbyist filing such a report to also file a statement of limited knowledge. I find it hard to see a situation in which the lobbying firm or lobbyist would not know exactly how much was spent that needs to be reported, since it spent it, and I therefore do not understand the need for allowing the statement of limited knowledge.

Chapter 57

The Qualifications for Exemption section, specifically §57.2(7), I find to be confusing. That paragraph says that a governmental entity must register and report as a principal if it has a lobbying firm or lobbyist other than one of its own elected or appointed officials, or one of its employees. It says that the registration and reporting must take place if the lobbying firm or lobbyist is representing the governmental entity "with respect to those nonexempt lobbying activities", and that the expenses involved "for the nonexempt lobbying activities" exceed the minimum threshold.

What are the "nonexempt lobbying activities"? Are there some things that a governmental entity can hire an outside lobbyist to work on and still not have to register and report? If so, what are they, and is this a wise policy?

I also have a question on the next paragraph (8) which deals with the religious exemption. As written, the exemption applies to a person who is a member of the church or religious body he or she is representing, and also to the church or religious body itself. Does this extend to a lobbyist representing an association of churches or religious bodies and to the association itself? The language of the Act is vague on this, and I think the regulations need to be tightened to make up for that.

Chapter 63

My main concern here is one that I had under the old Act 93 as well. The regulations allow for the Commission to act on its own to open up an investigation or inquiry. They are short on details describing how the Commission can decide to do that. Must it act on the basis of some substantive evidence or can it act solely on the basis of an anonymous tip or even its own whim? The same questions hold for the Executive Director who is allowed to conduct inquiries at his or her discretion. I think that the regulated community needs to have a little more certainty in this important area.

Under Act 93, many if not most of my major concerns with the regulations fell in this area of enforcement. I applaud you for producing a document that is infinitely better in almost every way than what came before.

Chapter 65

One of the major problems with the enforcement regulations under Act 93 was its insistence on a notice of noncompliance. That was changed in Act 134, and in these regulations, to a notice of alleged noncompliance. However, I think you missed one. Section 65.1(4) still refers to the notice of noncompliance. Simply adding the word "alleged" should solve the problem.

Missing Item

I have noticed that the regulations are silent on one of the more important improvements in Act 134 over Act 93, the prohibition on conflicts of interest. This section, §1307-A(d) is a new addition to the law and a substantial improvement over what has come before. It is not something that lobbyists in Pennsylvania have ever had to deal with in a statutory or regulatory setting.

Therefore, I feel very strongly that some guidance, possibly in the form of regulations, needs to come from this Committee to assist lobbyists in determining when they actually have a conflict of interest. I have been told many times that there is no such thing as conflict of interest unless and until a client objects. In other words, keep your clients in the dark and you won't get hurt. I reject that as being grossly insufficient. I think that putting internal review procedures for lobbyists and lobbying firms in the regulations, or perhaps in the form of guidelines, will protect the rights and interests of potentially conflicting principals.

Interim Guidelines

To begin with, thank you for producing the Interim Guidelines. I have found them to be useful even though I still have a number of questions that I hope will be cleared up in the future. However, although I have found the guidelines to be a help, not all of my clients have. They have complained to me that the guidelines are too filled with technical language and accounting jargon.

For many of my clients, and I am far from alone in this, the person who fills out the quarterly report is someone who is often doing it late at night on their home computer, possibly at their kitchen table. They know their field of business or professional endeavor, and they know enough about the finances of their organization to be able to do the reporting. What they don't necessarily know is how to be an accountant. I hope that when the final version of the Guidelines is done, that they are reworded into plainer language so as to allow all those doing the reporting to get the fullest possible benefit from them.

Conclusion

Once again, thank you for all of your work on the regulations and for allowing me to present these issues to you. I hope and trust that you will give them serious consideration before moving the package on through the regulatory review process.

I will be happy to attempt to answer any questions you may have.